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ALEXANDER L. STEVAS,
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83-639
NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RAY V. BELNAP,

Petitioner,

v.

ANDREW CHANG, Individually and in his capacity as Director of the DEPARTMENT OF SOCIAL SERVICES AND HOUSING, STATE OF HAWAII; NELSON K. DOI, Individually and in his capacity as LIEUTENANT GOVERNOR FOR THE STATE OF HAWAII,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 14, 1983

QUESTIONS PRESENTED

Whether State of Hawaii officials deprived Petitioner of federal constitutional due process in obtaining on the spot his resignation from a Civil Service post as Director of Correction, nor affording him any pretermination hearings, denying him any post-termination hearings on the grounds of untimeliness, and if they deprived him of his liberty interest.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on June 10, 1983, subsequently amended on July 18, 1983, concomitantly with Petitioner's Petition for Rehearing being denied.

OPINIONS BELOW

The June 10, 1983, opinion of the Court of Appeals, as amended on July 18, 1983, whose judgment is herein sought to be reviewed, is reported at _____ F.2d 2688 (9th Cir. 1983), No. 82-4206, and is reprinted in the separate Appendix to this Petition, pp A-1, A-2 . The prior opinion of the United States District Court for the District of Hawaii, also reprinted in the Appendix, is reported as Civil No. 77-0037, Judgment entered March 19, 1982, and is located on pp A-16 and A-17.

JURISDICTION

The Judgment of the Court of Appeals was originally entered on June 10, 1983, and subsequently amended on July 18, 1983, concomitantly with Petitioner's timely Petition for Rehearing being denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). In accordance with Rule 20, Rules of the Supreme Court of the United States, and 28 U.S.C. §2101(c), this Petition is timely filed.

QUESTIONS PRESENTED

Whether State of Hawaii officials deprived Petitioner of federal constitutional due process in obtaining on the spot his resignation from a Civil Service post as Director of Correction, not affording him any pretermination hearings, denying him any post-termination hearings on the grounds of untimeliness, and if they deprived him of his liberty interest.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a termination of State of Hawaii employment action brought by Ray V. Belnap, Petitioner, pursuant to 42 USC §1983 and 28 U.S.C. §1343. The litigation followed the

forced resignation of Petitioner on February 10, 1975, and the Complaint sought his reinstatement and back pay, as well as damages for the implication of his liberty interest. Petitioner had been a civil servant for at least eleven years, and held the position as Administrator of the Division of Corrections of the State of Hawaii. He had amassed some thirty years experience as a Corrections officer and for a decade and a half, had occupied a post at or near the top of his trade. His personnel performance evaluations were all above average or excellent in the State of Hawaii during his term of service in the State's top Corrections post. He had served with distinction under two Governors and four Directors of the Department of Social Services and Housing. Prior to February 10, 1975, he had no notice of any impending adverse action being taken against him.

The Respondent Officials of the State of Hawaii

In December of 1974, Nelson Doi became Lieutenant Governor of the State of Hawaii and Andrew Chang became Director of the Department of Social Services and Housing. The Department of Corrections is under the Department of Social Services and Housing. Nelson Doi had nurtured a grudge against Petitioner, and soon after he took office, became Chairman of a Prison Task Force. This Task Force set about to investigate Petitioner, and numerous guards at the Prison. Nelson Doi and the Task Force, with Andrew Chang being a member thereof, determined in January, 1975, to terminate Petitioner.

The Evidence

None of the actions or decision of the Prison Task Force was communicated to Petitioner, until on February 10, 1975, when the National Guard was called in to take control of the prison to maintain security

while 46 prison guards were transferred. With no advance notice, Respondent Andrew Chang called Petitioner into his office, informed him for the first time of the takeover, and handed Petitioner two letters, one a resignation effective immediately, and the other a lengthy dismissal letter, with a ten day suspension effective immediately and dismissal following on the eleventh day. Trial decision, pp 66 and 67, Appendix p A-30. Petitioner was denied a request for counsel, or additional time to consider his options, and a decision was called for from him on the spot. Petitioner tendered his own resignation letter within an hour. Trial Decision, pp 66 and 67, Appendix p A-31.

The situation in which the decision was made was highly political, with the pot being stirred by members of both executive and legislative branches. (Trial Decision, pp 67 and 68, Appendix p A-30) Petitioner was aware that there would be great publicity surrounding his termination, whether by resigna-

tion, or dismissal. (Trial Decision, pp 67 and 68, Appendix p A-32). The charges in the dismissal letter included serious charges, which if proven, would have impaired Petitioner's reputation for honesty and morality. (Trial Decision, pp 71 and 72, Appendix p A-38) The dismissal letter also represented a "laundry list" and make-weight, unsubstantial and unsubstantiatable charges. (Trial Decision, pp 71 and 72, Appendix p A-38). As Petitioner resigned within the hour, the dismissal letter was never sent to him, and he never had a copy thereof. It made reference to a twenty-day period within which, in accordance with Personnel Rules and Regulations, the dismissal could be appealed. There was no reference to Statutory appeals sections, and no reference to any appeal rights regarding a resignation.

On June 25, 1975, Petitioner petitioned the State Civil Service Commission for a hearing on his "coerced" resignation. The commission dismissed his Petition as untimely.

(Appellate decision, p 2689, Appendix p A-6) Petitioner filed his 28 U.S.C. §1343 and 42 U.S.C. §1983 action in the United States District Court on February 8, 1977, one day before the applicable statute of limitations for tort claims against the state had run. (Appellate decision, p 2689, Appendix p A-6)

The Rulings Below

The district Court ruled that Petitioner had a time of period in which to reflect; that he did in fact reflect; and that he was aware of the fact that he had a choice. It further ruled that it was true the choice was between two alternatives, each of which in some measure was unpleasant. (Trial Decision p 70, Appendix p A-36). The District Court found that the remaining charges, after striking out the old, shabby, and make-weight charges, were arguable, provable, and that Mr. Chang believed in good faith that they would support a dismissal. (Trial Decision p 73, Appendix p A-38).

The District Court's findings also included that Petitioner had not maintained his burden of proof that the discharge letter was brought in bad faith, and that, though the time was short for reflection, the facts did not add up to a set of circumstances which amounted to duress, coercion, intimidation, or constructive discharge. (Trial Decision, p 75, Appendix p A-44). The cases relied upon by the Court in finding that Petitioner's resignation was voluntary were Christie v. United States, 518 F.2d 584 (1975, Court of Claims), Taylor v. United States, 591 F. 2d 688 (1979, Court of Claims), and Van Arsdale v. Texas A & M, 628 F.2d 344 (1980, 5th Circuit). The Court of Appeals failed to uphold the Trial Court's finding of a voluntary resignation, and completely sidestepped this issue, claiming that Petitioner had nevertheless been accorded due process. The Ninth Circuit decision was based upon its opinion that, in the facts of the instant case, no pre-termination hearing was

required, (Appellate Decision p 2690, Appendix p A-10) that a post-termination hearing was available (Appellate Decision p 2691, Appendix p A-15), and that the Civil Service Commission properly rejected Petitioner's appeal as untimely. (Appellate Decision, p 2692, Appendix p A-6). The cases upon which the Ninth Circuit relied were Stephens v. Postmaster General, 623 F.2d 594 (9th Cir. 1980), Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974), Mathews v. Eldridge, 424 U.S 319, 335, 96 S. Ct. 893, 903, 47 L.Ed. 2d 18 (1976). It distinguished Jones v. Los Angeles Community College Dist., 702 F.2d 203 (9th Cir. 1983), and Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773, 778 (9th Cir. 1982) on the facts.

REASONS FOR GRANTING THE WRIT

1

Certiorari should be Granted to Resolve Conflicts in Principle Among the Lower Courts

The issue in this case is not exhaustion of a Civil Service commission appeal remedy for dismissal, as the 9th Circuit Court of Appeals has ruled, but that of a "forced resignation", where no appeal rights existed, and where there was a denial of any pretermination or post-termination hearing to Petitioner.

This is the first case of this sort before this Court of which Petitioner is aware. The lower courts have had significant number of forced resignation cases, and it is Petitioner's position that, when a resignation is forced, due process has been denied per se, so long as there are no appeal rights existent for attacking the resignation as voluntary. Only if the resignation is found to be voluntary, can any appeal rights be waived, if such rights are existent. The Ninth Circuit, in the decision herein contested, has begged the issue, never before having decided a forced resignation case, by finding that, whether by resignation or dismissal, with or without

specific appeal rights therefore being enunciated by statute, the possibility, however speculative, of a post-termination hearing, is sufficient to cure any due process violations. Such reasoning flies in the face of other lower court and this Court's decisions.

There is division among the lower courts as to what constitutes a forced resignation, such as requires a finding of denial of due process. As the Court of Appeals for the District of Columbia stated - correctly, we submit - in reviewing a similar case, Paroczay v. Hodges, 111 U.S. App. D.C. 362, 297 F.2d 439 (1961) and 211 F.Supp. 89 (1963) at pp 93, 94:

> "The Board of Appeals and Review must have concluded that there is a legal difference between facing a "choice" or resigning immediately or facing charges and facing a "demand" for an immediate resignation under "threat" of immediate charges. The above language which the Court of Appeals used to distinguish Rich, and the two cases cited by the Court of Appeals, 111 U.S. App. D.C. at 364 297 F.2d at 441, demonstrate that this conclusion is erroneous, and that in the circumstances of this cas, the very

> posing of the choice under an admitted threat of immediate charges rendered the resignation involuntary. As was stated in one of the two cases. "A voluntary act is an act proceeding from one's own choice or full consent unimpelled by another's influence." Kasumi Nakashima v. Acheson, 98 F. Supp. 11, 12 (S.D. Cal. 1951). And as was stated in the other case, it is *** the general rule that a claim of duress cannot be sustained where there is full knowledge of the facts of the situation and ample time and opportunity for full and free investigation, deliberation and reflection." Weisert v. Bramman, 358 Mo. 636, 216 S.W. 2d 430, 434 (1948). (Emphasis added).

The trial court in this case held that less than one hour after first learning of any adverse action was ample time and opportunity for full and investigation, deliberation and reflection. It is submitted that the reason the Ninth Circuit did not address the voluntariness of Petitioner's resignation is due to the fact that such could not legally be upheld. And yet the Ninth Circuit recited that there was an immediate need for Petitioner's termination, when there was no such finding of fact by the trial court.

Should this Honorable Court utilize Paroczay as the standard for what constitutes an involuntary resignation, then Petitioner's due process rights were violated, and his resignation void and no effect, therefore requiring no appeal. Therefore, the Ninth Circuit's reluctance to address the forced resignation cases is of paramount importance to any discussion of Petitioner's appeal rights, and alleged waiver thereof.

Another forced resignation case which recognizes the "time pressure" element as vitiating the voluntariness of a resignation is the Taylor case, supra, at p 692, upon which the District Court stated it relied in part. This Court of claims case stated:

> "But, as stated in FPM Supp 752-1, the fact that an employee is faced with an unpleasant situation or has to choose between two unpleasant alternatives does not make the resulting action involuntary unless there is deception, coercion, duress, time pressure, or intimidation." (Emphasis added)

For the Ninth Circuit to hold that Respondent's calling for Petitioner's resignation "on the spot" does not require a finding of forced resignation, is for it to close its eyes to other circuit decisions, which inconsistency only this High Court can resolve by granting this Petition for Writ of Certiorari. Two Fifth Circuit Court cases which also address the time element issue, although finding voluntariness in the resignation, are Coffman v. Baker, 590 F.2d 1366 (1979), and Van Arsdel v. Texas A & M, 628 F.2d 344 (1980), which the trial court said it took into consideration. In Coffman, the employee had three months notice and was not a victim of surprise, so that he was free to choose between alternatives he understood and was given a reasonable time, acquiescing in the effective date set by the agency, and the Court concluded that this was a voluntary resignation. The Van Arsdel case, wherein the department head had merely delineated the alter-

natives of resignation or facing dismissal proceedings, with no documents being produced or requested immediately, stated that "by knowingly and voluntarily resigning, the employee waives his rights to whatever procedural safeguards his dismissal would have triggered." The First Circuit case of Molinar v. Western Electric Co., 525 F.2d 521 (1975), also accepted the time pressure element as vitiating any concept of a voluntary resignation made well before an effective date of dismissal.

In yet another case, an Iowa District Court held in Atcherson v. Siebenmann, 458 F.Supp 526 (1978) at p 538, that a resignation under duress may be repudiated:

> [13] "Plaintiff Esther Atcherson's employment with the Johnson County Probation Office was terminated by the Defendant, Judge John Siebenmann. The circumstances of the May 2, 1975 meeting between the Plaintiff and the Defendant can only be interpreted as a request for a resignation after the Defendant had determined the Plaintiff should be severed from the Probation Office. The only choice presented to the Plaintiff on that

> occasion was an opportunity to protect her personal reputation by resigning, or to be fired. The Plaintiff may repudiate such a resignation.

Therefore, with the Court of Claims, the Court of Appeals for the District of Columbia, the Iowa District Court, The First, and Fifth Circuits all recognizing the time pressure element as vitiating any valid resignation, the Ninth Circuits refusal to do so in the instant case creates transparent inconsistency throughout these United States, which only this Honorable Court can address and resolve.

Moreso than even a "forced resignation" inconsitency being demonstrable in the cause herein, is a greatly more abhorrent repudiation of the traditional notions of fair play already ruled upon in the Ninth Circuit, and reciting the U.S. Supreme Court cases of Carey v. Piphus, 435 U.S. 247, 259-64, 98 S.Ct. 1042, 1050-52, 55 L.Ed. 2d 252 (1978), and Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 393, 47 L.Ed. 2d 18 (1976), among others. The Ninth Circuit fails

to apply herein the standard it enunciated in Vanelli, supra, at pages 503 and 504:

> [12, 13] "Application of this balancing test necessarily compels our determination that under these circumstances a pre-termination hearing is constitutionally required. The weight of the private interest affected is apparent. Teaching had been Vanelli's livelihood for over sixteen years, and the stigma arising from a midyear dismissal on the grounds here asserted would seriously impair opportunities for future employment. The interest of the school district in dismissing, rather than merely suspending, Vanelli without affording him a hearing is less clear. The lower court found no emergency situation requiring immediate dismissal, and on this record we cannot say the finding was clearly erroneous.[9] The risk of an erroneous deprivation was substantial, since appellant was dismissed and was denied the opportunity to respond to the charges at the school board meeting. The administrative burdens of permitting appellant to appear at the March 11 meeting and thereby proceeding to dismiss him without any opportunity to be hearin in person or in writing, the board deprived him of property and liberty interests without due process."

In the instant case, Petitioner had no advance warning, no advance notice, and no opportunity to be heard, much less having

been afforded any opportunity for a pre-termination hearing. He was a tenured civil servant, unlike the Plaintiff in Codd v. Velger, 429 U.S. 624, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977). In Justice Stevens dissent, he quotes Justice Frankfurter:

> "That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better, way been found for generating the feeling, so important to a popular government, that justice has been done." Anti-Fascist Committee v. McGrath, 341 U.S. 123 171-172 71 S.Ct. 624, 649, 95 L.Ed. 817 (concurring opinion).
>
> As the last sentence in this quotation demonstrates, if state action has consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty, it is essential that fair procedures be followed for reasons that have nothing to do with the merits of the individual case. Today's holding

> is only a minor impairment of this principle. But the principle is one that admits of no compromise.

Essential concepts of fair play have not been met in Petitioner's cause, and the Ninth Circuit fails to address these.

And in Owen v. City of Independence Missouri, 445 U.S. 662, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980), 42 USC § 1983, at page 1416 was specifically addressed in a case very close to the instant cause and this Court didn't find good faith as relieving officials from injurious conduct:

> [16, 17] Moreover, §1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. See Robertson v. Wegmann, 436 U.S. 584, 590-591, 98 S.Ct. 1991, 1995, 56 L.Ed.2d 554 (1978); Carey v. Piphus, 435 U.S. 247, 256-257, 98 S.Ct. 1042, 1048-1049, 55 L.Ed.2d 252 (1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens'

> consitutional rights.[34] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.[35] Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. Cf. Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L.Rev. 1133, 1218-1219 (1977).

The Ninth Circuit's holding is that Petitioner's failure to timely file a Civil Service Appeal over a resignation, when he didn't even have that right, was a waiver of any due process he may have been entitled to. The Personnel Rule referred to in the dismissal letter merely shown to Petitioner, was Sec. 4.301, which states:

> Sec. 4.301 Appeal Rights.
>
> "Any regular employee who is suspended, dismissed, or demoted may appeal to the Civil Service Commission within 20-days after notice has been sent to him of the

> suspension, dismissal, or demotion, provided that such 20 day period shall be extended to 20 days from the final notice on his grievance should he exercise the grievance channel. The appeal shall be made in accordance with the provisions of Regulation XIV." (Emphasis added)

Not only was this notice not sent to him, as required for the time deadline to begin to run, but he was not suspended, dismissed or demoted, rather forced to resign, with no appeal rights therefrom of which he had been made aware. All the resignation cases hold that there are no appeal rights from a voluntary resignation, and therefore the Ninth Circuit was required to first determine the voluntariness issue before it began invoking any exhaustion of administrative remedy as precluding recovery. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1960), held that failure to exhause state remedies does not defeat a claim under the Civil Rights Act since:

> "...the federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

The difference between a 20 day limitations and a two year state tort liability statute is substantial. The Ninth Circuit found, at page 3 of its decision, that the Petitioner's complaint was filed in the U.S. District Court one day before the applicable state statute ran. The case of Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980) at pages 105 and 106, addressed two different state remedies, one a 30 day statute of limitations for a Civil Service Commission Appeal, and the other a six month statute of limitations for filing of a complaint of racial discrimination:

> "Although we have consistently held that civil rights actions brought by dismissed or mistreated employees sound in tort rather than in contract, Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 318 (1st Cir. 1978); Graffals Gonzalez v. Garcia Santiago, 550 F.2d 687 (1st Cir. 1977), we have never indicated that a general tort statute of

limitations is automatically to be used in place of limitations contained in state statutes specifically tailored to deal with the plaintiff's cause of action. See e. g., Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d at 318 (Puerto Rico statute regulating political discharge of employees more analogous than general tort statute but contained no specific statute of limitations. Determination of the "most analogous" state statute requires a careful analysis of state law.

While we see merit in the DeLuca court's reasoning that civil rights plaintiffs may need more than thirty days to file a civil rights complaint, we think a six-month limitation reasonable. Although it may take more than six months to properly prepare a civil rights case, a complaint meeting requirement of Fed.R.Civ.P. 8 (a) can surely be filed in that time. And amendments to the complaint and supplemental pleadings may be sought after suit is brought. Fed.R.Civ.P. 15. Moreover, if the plaintiff is required to exhaust his state administrative remedies, a matter of some dispute, see note 14 infra, his case will have already been prepared and with little, if any, modification can easily be filed within six months of the decision of the state agency."

There exists, therefore, another area in which different circuits inconsistently treat consitutional issues, rights, and remedies. Only this Honorable Court can resolve these inconsistencies. It is illogical that Plaintiffs in the Ninth Circuit must, with periods as short as twenty days, file federal causes of action in State administrative proceedings, while those in the First Circuit need only file within applicable statutory deadlines for tort actions. Since we have argued that both the Court of Appeals and the district court applied erroneous legal principles in determining that either Petitioner voluntarily resigned, or that he failed to exhaust a State administrative remedy, and since there are conflicts in principle among the lower courts in both areas, the district court's order should have been reversed.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

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October 14, 1983

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAY V. BELNAP,

Appellant,

v.

ANDREW CHANG, individually and in his capacity as Director of the Department of Social Services and Housing, State of Hawaii, et al.,

Appellee.

No. 82-4206

Appeal from the United States District Court
for the District of Hawaii
James M. Burns, District Judge, Presiding
Argued and submitted February 16, 1983

DC No. Cv-77-0037

Before: GOODWIN, TANG and FARRIS, Circuit Judges

ORDER AMENDING OPINION

The opinion is hereby amended as follows:

On slip opinion page 2689, second column, second paragraph, lines 4 and 5, delete "§ 76-30 (1976)" and "§ 76-48 (1976)" and insert

"§76-30 (1968)" and "§ 76-48 (1968)".

With the above amendment, the petition for rehearing is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAY V. BELNAP,

Appellant,

v.

ANDREW CHANG, individually and in his capacity as Director of the Department of Social Services and Housing, State of Hawaii, et al.,

Appellee.

No. 82-4206

Appeal from the United States District Court
for the District of Hawaii
James M. Burns, District Judge, Presiding
Argued and submitted February 4, 1983

DC No. Cv-77-0037

June 10, 1983

Before: GOODWIN, TANG and FARRIS, Circuit Judges

OPINION

GOODWIN, Circuit Judge

Ray V. Belnap, former Director of Corrections for the State of Hawaii, appeals a

judgment holding that his resignation did not deprive him of liberty or property without due process of law.

On February 10, 1975, Andrew Chang, Director of the Department of Social Services and Housing, informed Belnap that if he did not resign he would be suspended from his job for 10 days and then dismissed. Chang had prepared two letters, one a letter of resignation, and the other a letter of dismissal. Belnap read both documents and said that he wanted to prepare his own resignation letter. He went back to his office and wrote "I wish to submit my resignation from my position as Corrections Division Administrator and retire from state service after 14 years to be effective February 10, 1975." Belnap signed the letter and submitted it to Chang within an hour of their first meeting. Belnap now claims that he was under time pressure imposed by Chang and that therefore his resignation was

coerced. He claims that the constructive dismissal deprived him of a property interest without due process of law.

Chang sought Belnap's resignation at the recommendation of a prison task force chaired by Lieutenant Governor Doi. The task force had been appointed to investigate a number of problems within the prison system, including corruption, inmate-held weapons, and security, disciplinary and morale deficiencies. At the task force's recommendation, the National Guard was called in and took over the prison just a few hours before Belnap resigned. Numerous stories in the press and statements by Lieutenant Governor Doi and others reflected unfavorably upon Belnap's competence as an administrator. Belnap contends that because this publicity injured his reputation, he was also deprived of a liberty interest without due process of law.

Belnap was a civil servant. As such, he was "entitled to hold his position during

good behavior . . ." Hawaii Revised Statutes §§ 76-30 (1976). Hawaii Revised Statutes §76 -48 (1976) provides:

> "As to any matter within the scope of this part, any person suffering legal wrong because of any action by . . . his appointing authority, or adversely affected or aggrieved by such action, shall be entitled to appeal to the civil service commission . . . . The appeal shall be made within twenty days after notice of the action has been sent to the person. . . ."

Belnap petitioned the State Civil Service Commission for a hearing on his "coerced" resignation on June 25, 1975, four and one-half months after the resignation. The commission dismissed Belnap's petition as untimely. Belnap appealed to the Hawaii state courts and his appeal was dismissed on March 7, 1977. He filed his 28 U.S.C. §1343 and 42 U.S.C. § 1983 action in the United States District Court on February 8, 1977, one day before the applicable statute of limitations for tort claims against the state had run. After a lengthy trial, the

court found that Belnap had resigned voluntarily. The court also held that neither Chang nor Doi had violated Belnap's right to due process of law.

We must accept the trial court's findings of fact if they are not clearly erroneous. Fed R. Civ. P. 52. The trial court's application of a legal standard is reviewable as a question of law. United States v. Smith, 625 F.2d 278 (9th Cir. 1980). The facts in the case before us are not in substantial dispute. The question of due process is in dispute.

The Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970), enunciated a two-step process for analyzing cases involving deprivation of a governmental benefit. First it must be ascertained whether the interest at issue is a constitutionally protected "property" or "liberty" interest. Second, if the interest is a protected one, the court must determine if the deprived beneficiary

has been afforded due process. Geneva Towers Tenants Org. v. Federated Mortgage Inv., 504 F.2d 483, 488 (9th Cir. 1974).

Belnap had a protected property interest in his job. We can assume, without deciding, that a liberty interest also was affected. See Owen v. City of Independence, 445 U.S. 622 (1980). The important question is what process was "due" to Belnap.

The district court found that Belnap's resignation was not coerced and that he had voluntarily relinquished his property and liberty interests, citing McGucken v. United States, 407 F.2d 1349 (Ct. Cl.), cert. denied, 396 U.S. 894 (1969) and Christie v. United States, 518 F.2d 584 (Ct. Cl. 1975). We need not reach the correctness of the finding of voluntariness, however, because even if Belnap's resignation was coerced, as he now contends, he was nevertheless afforded due process.

In Stephens v. Postmaster General, 623 F.2d 594 (9th Cir. 1980), we affirmed a district court's dismissal of a due process claim against the Postmaster General. A discharged postal worker had appealed to the Civil Service Commission too late under the Postal Service rules, and his appeal was rejected as untimely. The Civil Service Commission's Board of Appeals and Review had affirmed. We held that where procedures are established for a hearing concerning discharges and a discharged employee does not avail himself of those procedures in a timely fashion, he forfeits his right to the post-discharge hearing. We therefore upheld the Civil Service Commission's rejection of his appeal because he had not brought the appeal within 15 days following the effective date of removal. We also held that the failure to file a timely appeal constitutes a failure to exhaust administrative remedies, thus precluding judicial review. We noted that

Stephens was fully aware of the 15-day time limit.

Stephens controls the case at hand. Belnap was aware of the 20-day time limit on appeals of adverse actions under Hawaii Revised Statutes § 76-48. That time limit was specifically noted in the last paragraph of the dismissal letter that was shown to Belnap on the day of his resignation. Belnap himself had discharged a number of employees and was aware of the regulations. His appeal to the State Civil Service Commission states: "I realize that this appeal is not made within the 20-day period authorized by the rules and regulations."

Although the procedure that Hawaii has established for appeals of dismissals does not provide for a pretermination hearing, such hearings have not been required by law in every case. A post-termination hearing that includes the possibility of reinstatement with back pay was upheld in Arnett v.

Kennedy, 416 U.S. 134 (1974). In Arnett the court upheld the Office of Economic Opportunity's employee dismissal procedure that provided a trial type hearing only after termination. Justice Powell in his concurrence noted that the government's interests in expeditious removal of unsatisfactory employees and in employee efficiency and disipline must be balanced against the employee's interest in continued public employment. He found that the "requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges." Id. at 168.

In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the Court prescribed a balancing test to determine what process is due for the termination of a governmental benefit. The three factors that should be considered are (1) the private benefits that will be terminated, (2) the decreased probability

of erroneous deprivation of benefits with additional procedural safeguards and, balanced against (1) and (2), (3) the cost to the government and the public of additional procedural safeguards. Id. at 335.

In Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773, 778 (9th Cir. 1982), we applied the balancing test of Mathews v. Eldridge, and held that a pretermination hearing would have mitigated damages on the facts of that case. In Vanelli, a school teacher, in the middle of a contract year, was dismissed on the basis of complaint by five female students that he was harassing them sexually. Vanelli is exactly the type of case in which the time element is not urgent compared to the impact of termination with its serious career implications for a teacher. A hearing with confrontation and rebuttal evidence should have been afforded in advance of dismissal. Dismissal was upheld, however, in that case on the basis

of a post-termination hearing that satisfied due process.

Again, in Jones v. Los Angeles Community College Dist., ___ F.2d ____ (9th Cir. March 25, 1983), we held that where a police officer was fired for dishonesty in taking other employment while on sick leave, a pretermination hearing was necessary to satisfy the balancing test of Mathews v. Eldridge. In Jones, as in Vanelli, there was no urgency about the time of the termination, and orderly process as well as fairness to the employee counselled a pretermination hearing. In the case at bar, however, Belnap was notified that he could resign or be fired immediately because the prison under his supervision was out of control and the governor had thought it necessary to call in the National Guard to maintain order. In this kind of exigency, there was no federal constitutional deprivation in obtaining Belnap's resignation on the spot and in

making the hearing available afterward.

Hawaii's employee dismissal and appeals procedure in this case met the Mathews test. As in Mathews, the interruption of income of a state employee while he appeals a dismissal is not as important as the orderly functioning of government. The dismissed state employee ordinarily can find another job or draw unemployment compensation while making his case for reinstatement with back pay. Belnap was drawing retirement benefits.

Post-termination hearings that satisfy the Mathews v. Eldridge test allow former state employees to assert their rights while still protecting the public interest in efficient and decisive public administration. To require pretermination hearings in every case would not significantly add to the ability of dismissed employees to assert constitutional rights, but in some circumstances may threaten sensitive and important governmental operations.

The Hawaii Civil Service appeals process does not, per se, violate due process. The procedure was available and timely. Belnap did not avail himself of that procedure until too late. The State Civil Service Commission's rejection to his appeal was proper. Stephens v. Postmaster General, 623 F.2d 594 (9th Cir. 1980). Belnap therefore was not deprived of his liberty or property interests without due process of law.

Affirmed.

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RAY V. BELNAP,

Plaintiff,

vs.

ANDREW CHANG, Individually and in his capacity as Director of the Department of Social Services and Housing, State of Hawaii; NELSON K. DOI, Individually and in his capacity as Lieutenant Governor of the State of Hawaii; FRANCIS H. YAMADA, Individually and in his capacity as Chairman of the Civil Service Commission of the State of Hawaii; MICHAEL S. KITAGAWA, THOMAS HUGO, VICTOR PUNNA, WILLIAM SUZUKI and THOMAS TOGUCHI, Individually and in their capacity as members of the Civil Service Commission, State of Hawaii; DONALD BOTELHO,

Individually and in his capacity
as Director of the Department
of Personnel Services, State of Hawaii,

Defendants.

CIVIL NO. 77-0037

JUDGMENT

This action came on for trial before the Court, United States District Judge James M. Burns presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Defendants and against Plaintiff, and that all parties bear their own costs of action.

DATED: Honolulu, Hawaii, March 19, 1982.

s/Walter A. Y. H Chinn
CLERK OF THE COURT

[Filed: Mar 19, 1982]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RAY V. BELNAP,

Plaintiff,

vs.

ANDREW CHANG, et al.,

Defendants.

CIVIL NO. 77-0037

PARTIAL
TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing commencing on Tuesday, March 2, 1982, at 9:40 A.M., at Honolulu, Hawaii,

BEFORE:

HONORABLE JAMES M. BURNS, Judge.

APPEARANCES:

E. COURTNEY KAHR, Esq.
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Suite 102
Lihue, Kauai, Hawaii — Appearing for the Plaintiff;

RUSSELL S. KATO, Esq.
GARY W. B. CHANG, Esq.
Deputy Attorneys General
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415 South Beretania Street
Honolulu, Hawaii Appearing for the Defendants.

THE CLERK: Civil No. 77-0037, Ray V. Belnap vs. Andrew Chang, etc., et al.

* * * * *

THE COURT: The following, when transcribed will be filed with the Clerk and will be treated as findings and conclusions pursuant to Rule 52. Because some of this comes from a rough draft of some portions previously prepared and because some of it comes not from any drafted material, I expect there will be in addition to some positively atrocious grammar that there will be some inadvertent errors and such things as dates and times will be incorrect. Therefore, I reserve the jurisdiction to amend those findings which come from a transcription of these remarks.

In addition, I confer upon counsel the opportunity, following their receipt of the transcript of these remarks, the opportunity to propose other additional or different findings in the ordinary sense in which findings are frequently handled in civil cases.

In short, it may be that I will have overlooked a specific area as to which a finding should be made for any purpose of review that may later be sought; but I rule in this fashion for several reasons. One is I think it is preferable, if at all possible, for a judge to deliver his decision as promptly as the circumstances will permit; and, if at all possible, face to face in the sense of being present in the same forum with the parties and with the attorneys.

Secondly, the facts, of course, never get fresher in one's mind. They get less fresh. And, third, if I took the case under advisement and undertook to prepare a

written opinion, the grammer might be something of which I would be more proud but I don't think the result would be any less correct. Indeed, the result might be less correct due to the passage of time and due to other intervening responsibilities which I have here as well as in my home district.

In any event, I believe it is preferable to deliver the decision in this fashion.

This case in one sense is simple and straightforward and in another sense it is complex probably due to the lengthy history it covers or refers to, and probably also due to the subtleties and nuances necessarily involved in a human relationship between two strong-minded men who work in a public arena and who were mutually confronted by some of the most stubborn and intractable problems in our society.

It is also baffling in a way, despite the lack of any substantial dispute over the basic facts which lay at the center of the

controversy. This is probably because at the core, while it is relatively simple and uncomplicated, that core has ramifications subject to interpretation by opposing sides, each of whom shapes his interpretation in light of the pressures which converged on February 10, 1975, and in light of the public explosion and outery which followed.

It may be of minimal assistance to the parties and to those members of the public who are interested for me to describe briefly the case, the issues and the undisputed facts, so far as I find them to be undisputed, before proceeding with the more formal process of findings and conclusions under Rule 52.

This action is based upon a claim under Section 1983, Title 42 of the U. S. Code. That section, which derives from the Civil Rights Act, which emanated from early sessions of the Congress following the Civil War, reads in relevant part as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any state, subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law sued in equity or other proceeding for redress.

The jurisdiction of this Court is based upon Title 28, Section 1343, not I note under Section 1331 as the papers have previously stated.

Section 1343 provides jurisdiction in the United States district court to redress a deprivation under color of any state law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for the equal right of citizens of the

United States.

Plaintiff was a public employee of the State of Hawaii and has been for about 14 years. He was Administrator of the Division of Corrections and was subordinate to Chang, the principal defendant in his, that is, Chang's, capacity as Director of the Department of Social Services and Housing.

Plaintiff as a public employee was entitled to those substantive and procedural rights available under the relevant provisions of Hawaii statutes and rules and regulations promulgated thereunder if his dismissal was to be accomplished.

Plaintiff's employment ended abruptly about 8:30 A.M., Monday, February 10, 1975. Plaintiff claims that the termination, the manner in which it occurred, and the statements made and events occurring at the time and shortly thereafter, in which defendants Chang and Doi were involved, constituted a violation of his liberty and property

interests, in violation of due process rights under Section 1983 and the Fourteenth Amendment.

Defendants say that the termination was simply a resignation by plaintiff, but such resignation came about validly and voluntarily, and that no deprivation occurred which would provide a basis for either injunctive or damage relief sought by the plaintiff.

The plaintiff agrees his termination was, as a matter of form, a resignation, but he denies that it was valid or voluntary. Rather, he says it was coerced, obtained under hydraulic social and political pressures which amount in law to duress and that it occurred under circumstances that we lawyers and judges call a constructive discharge.

Plaintiff's thesis thus is, since his termination was a discharge, his liberty and property interests were violated, rather than being observed, and that he is entitled

to the relief.

It may be useful to remind ourselves of the law applicable in this respect, and I refer specifically to provision of the recent opinion in the Vanelli case, to which counsel's attention has been drawn earlier in this case.

The Fourteenth Amendment guarantee of procedural due process applies when a constitutionally protected liberty or property interest is at stake. An interest in property arises only when there is a legitimate claim of entitlement rather than abstract need or desire for the particular benefit.

In this instance, of course, the plaintiff, as an employee, had a legitimate claim of entitlement to continued employment and continuance in his job, and thus he had a property interest within the meaning of the Constitution and within the meaning of Section 1983.

A person's interest in liberty is similarly implicated if the charge impairs his reputation for honesty or morality. As stated in the Stretten case, a person's liberty interest and an employee's liberty interest is implicated when the State makes a charge against him that might seriously damage his standing and association in his community.

The procedural protections of due process apply if the accuracy of the charge is contested, which is true here, there is some public disclosure of the charge, which is true here, and it is made in connection with the termination of employment or the alteration of some right or status recognized by State law.

In this instance, of course, while there is no evidence that the specified charges in the dismissal letter were made public at the time or shortly thereafter, there is no question but that the facts justify a finding

that the discussion which surrounded it immediately afterward, particularly the statements made by Lieutenant Governor Doi, are sufficient to trigger the protection of the liberty interest which otherwise would have been affected by virtue of the reflection that was cast upon the plaintiff as a result of the circumstances of the termination.

As to the basic facts themselves, which occurred on the early morning hours of February 10, 1975, as I have previously mentioned, there really is very little dispute as to what happened.

With respect to the events of that morning, it seems clear Mr. Chang placed a phone call about 6:30 in the morning. There is a dispute between Mr. Chang and Mr. Belnap as to whether or not mention was made during that phone call that the National Guard was being sent into the prison. I accept Mr. Chang's version of that set of events as opposed to Mr. Belnap's version; and I should

say in this regard, as is true throughout this case and as is true in my characterization of the accounts which have been furnished here, I do not regard either Mr. Belnap or Mr. Chang as having come to the witness stand here in this court, or having come to the witness stand in deposition, and having told lies. I think both of them testified as truthfully as they were capable of testifying.

As mentioned a little bit ago in connection with the discussion with counsel, I think that accounts of events are frequently to be expected--one would be surprised if they didn't occur--because of the fact that the parties later recite the events in light of the positions that have been assumed in connection with the lawsuit; but, wherever I have said that I prefer one person's version of events over the other, it should not be taken as any indication that I believe that either of these gentle-

men lied. Indeed, I don't think either lied. I think each one tried to tell the truth the best he knew how.

In any event, Mr. Belnap came to the office and arrived there about 8:00 and, in a situation which was marked more by an absence of conversation than a proliferation of verbiage, he was advised he had two choices. One was a choice of submitting a letter of resignation. The other was a choice of being presented with a letter of dismissal, and he was afforded opportunity to read over each of those documents; and there is no evidence that he would have been denied the opportunity to remove those documents back to his own office, though it is unnecessary for me to make a finding in that respect.'

The initial encounter I find took about 15 minutes, though again the precise amount of time involved isn't of that much significance in my view. In any event, the situation was presented sufficiently clearly to

justify the finding that I have already in effect made, namely, that it was a situation in which some action was called for on Mr. Belnap's part by Mr. Chang within the hour.

I further find that in fact the action was taken within the hour, probably taken by about 8:30 to 8:45. Again, the precise time, in my view, is not that significant.

Mr. Belnap returned to his office. He prepared the letter which I think appears as exhibit 3, excuse me, exhibit 4, plaintiff's exhibit 4, and returned and handed it in to Mr. Belnap, excuse me, to Mr. Chang, thus accomplishing at least formally the choice of the resignation as opposed to the dismissal aspect.

Now, the situation, as it existed as of that time, was one in which plaintiff obviously was faced with a set of unpleasant alternatives. On the one hand he was confronted with facing an involuntary dismissal based upon a lengthy set of charges of dere-

liction of duties, which, according to Chang in the defendant's position, all of which constituted grounds for dismissal under Civil Service regulations.

On the other hand, he was faced with resignation in a manner which I find, despite the statement made earlier this morning, I find that reasonable person would have believed was one which was necessary to preserve his retirement benefits and which, in the mind of a reasonable person, would to some extent at least carry with it the flavor of a voluntary decision.

It is true that plaintiff also, as a reasonable person at that time, could reasonably have expected that either choice would be accompanied by a flurry of statements, charges and comments, primarily because the decision affected such matters of keen and deep public and media interest.

Further, the decision in the context involved... . Excuse me. The context

involved in which the decision was made was highly political, known by both sides as being such, with the pot being stirred by members of both executive and legislative branches of government, some, perhaps many, of whom were ready to indulge the all too human characteristic trying to put the blame on somebody else.

In addition, the presence of the Lieutenant Governor as head of the task force meant that it was perhaps likely that even the lesser alternative of resignation would be accompanied by statements derogatory to the plaintiff because of his, that is, Mr. Belnap's, knowledge of Mr. Doi's attitutde toward him.

These matters did not occur in a vacuum, and, while I agree with counsel that the test is not a subjective one from the standpoint of the employee, nonetheless, objective evaluation of the employee's situation and characteristics is a necessary part of the

picture.

Plaintiff at that time was a man who had nearly 30 years of experience in a tough and demanding profession. Prison administrators are regularly confronted with crisis situations often involving matters where life and human safety are closely involved. Prison work and prison administration is not for the weak.

Plaintiff has held responsible positions for many years and had occupied a post at or near the top of his trade for a decade and a half. He was at the time 57 years of age, at or near the peak of his power, resources and ability. Thus, even though he was confronted with apparently only two alternatives, each unpleasant, the fact remains that he had a period of time in which to reflect, and the record shows that he did reflect.

I refer specifically in this regard to the portions of Mr. Belnap's deposition found

at pages 114 and 115 in which he was asked: But you do admit you had a choice of accepting that dismissal and being charged and fighting it out, is that correct? Answer: Yes. Question: You decided that alternative was not attractive, is that correct? Answer: Yes. Question: Why so, Mr. Belnap? Answer: Simply because after 14 years under the retirement system there was a possibility of getting a few bucks. If you resign and retire, you can go on to retirement. If you stand and fight, you have no income. You are then forced to monetarily deplete what you've got. You've got to give up something. I looked at my family and my circumstances and I was not about to be in a long time legal hassle with the Civil Service as I had witnessed happen in 1961. Question: So you're saying that in these 10 to 15 minutes you considered your family, to avoid the possibility of losing your retirement you decided to accept what you call the forced

resignation, is that correct? Answer: Yes.

I should add also that, with respect to the differing versions, slightly differing versions, of the events of the morning of the 10th, the portions which I accept largely in full come from Mr. Belnap's deposition running from about page 82 to about page 116, and in Mr. Chang's deposition from about 84 for the next five or six pages; and in each event, as I say, I find very little between those versions.

In any event, the fact remains, and this is shown by a clear preponderance of the evidence, that Mr. Belnap had a time of period in which to reflect; that he did in fact reflect; and that he was aware of the fact that he had a choice. It is true the choice was between two alternatives, each of which in some measure was unpleasant.

It's not necessary for me to perhaps make a finding in this regard, but I observe that, if someone really understood what was

in Mr. Belnap's mind at the moment, though I think trying to find out what is in another person's mind while a fascinating bit of occupation is almost impossible, if one really knew that, however, my observation would be that the thing that was the strongest motivation in his mind at the moment was that he was faced with at least one possibility in which his career, of which he was proud, was coming to an end in a way which would cast discredit not only upon him personally but cast discredit upon the work that he had done in a tough and demanding profession and work that almost no one in our society appreciates and understands, the work of those who labor in the prison vineyard; and I suspect that even though economics also plays a very important role in our lives that in fact the person's diminution and dissolution of stature from a professional standpoint in fact played the largest part.

I'm not probably entitled to go too deeply into subjective analysis in light of the case law which I have been presented with, but I make that observation nonetheless.

Now, the time was sufficient under the circumstances and the choices were present. That brings us to an analysis of the charges with which Mr. Belnap was faced at that time; and the charges contain a number of things.

I have referred to it perhaps more demeaningly than I should as a kind of laundry list, and Mr. Belnap was confronted with some charges which, at the most charitable, I can only call make-weight charges. For example, the '65 memo, which is referred to and which is an exhibit here, to use that as a charge of grounds of dismissal in the year 1975 cannot possibly be regarded as a substantial charge. It cannot be regarded as recent, and certainly can't be regarded as an arguably provable charge brought by the employer.

The same thing is true, though to a lesser extent, as to the charges which refer to the 1973 memo from Mr. Thompson. If in fact those are recent and substantial and arguably provable charges, something would have been done about them; and the insertion in the dismissal letter of those sort of things at the most charitable can be described only as shabbiness on the part of the author of the letter.

I can understand that Mr. Chang believed that he was in a tough situation; that, if Mr. Belnap chose to stay and fight, that he wanted to assemble every arrow in the quiver and perhaps that is understandable for a person newly in that position, somewhat less sure than an older person would have been, and a person who is about to bring down, as it were, the top man in Corrections in the State of Hawaii for a decade and a half.

That doesn't, however, in my mind, excuse the shabbiness of the recital of some of those things in the letter of resignation. Shabbiness, however, is not the same as a deprivation of due process.

The letter of dismissal also contained other items with respect to matters relative to some claim of using funds from unauthorized sources vis-a-vis the Adult Furlough Center in 1970--that's subparagraph a--the matter in subparagraph b with respect to the assignment of adult correctional workers as to a particular area and duty in October of 1971; c, the reorganization in 1971 of the Hawaii Youth Correctional Facility and, 4, reclassification of guards in March of 1972. These are all ancient kind of things and it was shabby and inappropriate, in my view, for them to have been inserted into the letter.

The letter, however, also--and Mr. Chang's testimony I think flushes this out and gives it context--the letter also addresses serious

matters about which Mr. Chang obviously was seriously concerned with respect to the overall issue of Mr. Belnap's competence as an administrator; and there were serious issues, even issues which could fairly be called by an observer as emergency issues, which had arisen at the prison and which in Mr. Chang's mind tended to show that Mr. Belnap was not and could not be placed in the position or kept in the position in which administratively those issues would be properly addressed and gotten to and something done about.

And, as to the central issues and allegations contained in the letter, those of incompetence, inefficiency, inability to work with subordinates, inablity to propose, direct, carry out, and maintain the programs relative to guard training, relative to the violence in the prison, relative to contraband, all those things were in fact serious

charges. They were arguably provable charges and the evidence justifies a finding, and I do find, that they were held and entertained by Mr. Chang in good faith; that he believed in good faith that they would support dismissal; and that he believed in good faith that, were the matter to go to the mat before the Civil Service Commission, that those charges would be upheld.

The fact that Mr. Chang accompanied valid charges along with shabby ones does not in fact, in my view, add up to the kind of bad faith or unsubstantiated charges which produced coerciveness when viewed in this context.

The fact that Mr. Chang could well have believed that others, as well as Mr. Belnap, should bite the dust but didn't include them doesn't of course invalidate the quality and substantiality and provability of the charges that he chose to make and believed he ought to make against Mr. Belnap alone.

As was shown by several of the witnesses during the course of this case, the fact of the business is that, if the authorities in the State of Hawaii wanted to make somebody bite the dust for administrative failures, they had all kinds of opportunity to do so. They could have done so in the fall of 1973 when it became necessary to sent in the National Guard. They could have at that point, and perhaps wiser governors or top administrators would have at that point, relieved Mr. Olim and Mr. Belnap and Mr. Thompson or Mr Chang, as the case may be. But it isn't up to me, thank the Lord, to evaluate the wisdom of public policy choices that were made by governmental officials in the State of Hawaii in the year 1973, '74 or '75, or even, for that matter, in the year 1981. The wisdom of these events is not for me. I am to make findings with respect to a difficult issue of the question of coercive discharge, coercion, duress,

and that's the extent of my obligation.

In short, I do not find that the plaintiff has maintained his burden of proof with respect to the necessary elements for constructive discharge; that the plaintiff has not maintained his burden of proof that the discharge letter was brought in bad faith, even though, as I have already said, some of the charges were shabby indeed and should not have been included in there; but that does not amount to a finding of lack of substantitation, bad faith or presence in the mind of the employer that he knew or believed that the charges were not well taken.

I further find that though the time was short that there was time for reflection. I further find that Mr. Belnap was able to reflect upon the matter. He was confronted with a difficult decision. He made a decision, which all of us, in scanning our own minds and consciences, could probably well sympathize with him for, but I do not find

that these facts add up to the sort of set of circumstances which amount to duress, coercion, intimidation or constructive discharge within the meaning of the cases which we have discussed.

I rely in part upon the Christie case, though not entirely; I rely in part on the Taylor case; I rely in part on the Van Arsdel case; and I rely in part upon the rather clumsy phraseology that I myself worked out and visited with counsel about the other day.

In short, I find that plaintiff has not maintained his burden of proof with respect to finding that his resignation was involuntary; that it was produced by coercion; that it was otherwise to be set aside; and I find that he has failed to maintain his burden of proof to overcome the rebuttable presumption that the resignation was voluntary.

In short, I find in favor of the defendant and against the plaintiff.

I add a word or two because it may become useful. I add a word or two to this effect. It is unclear as to when Mr. Chang firmly became convinced that termination of Mr. Belnap was called for. I do not believe the facts justify a finding that Mr. Chang was persuaded as of December 20, 1974, when the task force was formally organized, that Mr. Belnap would have to go. I do think, as of that period of time and for some period of time before that, I think that Mr. Chang entertained that at least as a possiblity. I do not, however, find that Mr. Chang went into the task force in a way which is sometimes inelegantly referred to as it simply being a stacked deck.

I am not so sure about Mr. Doi as to whether or not he was firmly convinced from the very outset that Belnap would have to go regardless of what the task force might come up with. I say that with some degree of sadness because I do not mean to

demean anybody who has held responsible positions such as Mr. Doi has held.

It seemed clear to me, however, from analyzing his testimony and the demeanor that he displayed here on the stand, it seemed clear to me that Mr. Doi had nurtured a grudge against Mr. Belnap for a good many years long before the task force commenced in 1974; and it is sad to see that kind of set of circumstances persist. But, even if my finding in this regard is correct, nonetheless, the evidence is clear here that the basic decision to terminate was not made by Mr. Doi but was made by Mr. Chang.

If I were satisfied that it was in fact a constructive discharge, I would have no hesitancy whatsoever in holding Mr. Doi in the picture as an actor upon the stage and as one who would bear responsiblity for violation of civil rights.

It seems to me that somewhere probably in about mid-January, mid or late part of

January, it became clear to Mr. Chang that in fact he had formerly viewed probably only as a possibility was in fact then appearing to him as a probability, namely, that, of the changes to be made, one would necessarily have to be the departure of Mr. Belnap. And, in addition, Mr. Chang was of the notion, as were the other members of the task force, that, as long as bringing in the National Guard were then contemplated as probably a likelihood, it became necessary for that work to be carried on in secret; and that certainly by the early part of February or the latter part of January the decision to terminate Belnap had been made and from there on it was a matter of drafting and getting the ducks lined up, so to speak, and it culminated with the events on the morning of the 10th.

But I'm not able to find on the evidence here before me that Chang went into the task force effort fully committed to dispense with the services of Belnap. So that, inso-

far as the formation of the task force is contended as being simply a guise for carrying out the earlier formed decisions or wishes of the administrators, I don't regard it as such. I simply say that, in my view, the facts justify a finding that Chang was dissatisfied. His dissatisfaction was probably diffused; and he held out at least the possiblity that it was wiser not to bring Mr. Belnap into the task force operations themselves. I do not believe, however, that he had made up his own mind to terminate Mr. Belnap at the outset of the task force work and study.

As mentioned at the outset, making findings by way of an oral opinion from the bench has its dangers, the least of which is the poor grammar that is customarily displayed. It also has its dangers in that I may very well have overlooked some specific factual matter which is set out in the pretrial statement or set out otherwise in the

contentions of the parties; and I'm certainly amenable to adding to the findings and conclusions, after they have been transcribed and after counsel have had an opportunity to look them over.

I also indicate, in view of the findings and conclusions that I've arrived at to save you all some time and effort, that, if it were to be contended by the defendants that they would be entitled to attorney's fees under Section 1988 that I would deny such a request. I am satisfied they can nowhere nearly meet the standard of the Christiansburg Garment case. I am satisfied that Mr. Belnap brought this action in good faith, and that defendants would not be entitled to attorney's fees.

I also exercise my discretion not to award costs in this case.

I express my appreciation to the attorneys in this case. I have scolded them a little bit from time to time, but I do ex-

press my appreciation to the attorneys. By and large, they have done a good job on behalf of their clients. I express my appreciation to Mr. Belnap and to Mr. Chang--if he were here I would do that--for the dignified and appropriate way in which they have pursued this matter, in which they have cooperated with the Court, and in which they furnished their testimony and conducted themselves in an entirely appropriate way. They are both in a difficult situation, personally very distressing to both of them, I'm sure; and I express my admiration to them for the way in which they have conducted themselves.

That's the order of the Court. Thank you.

(The proceedings adjourned at 12:30 P.M., March 9, 1982.)

I, Dianna-W. Orndoff, Official Court Reporter, U.S. District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify

that the foregoing is a true and correct partial transcript of proceedings in Civil No. 77-0037, RAY V. BELNAP vs ANDREW CHANG, et al., held in the above-named court on March 9, 1982, before the Honorable James M. Burns, Judge.

March 13, 1982 s/Dianna W. Orndoff